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ABSTRACT

This guide examines the incorporation of nongovernmental funding streams into state-wide programs of technology-related assistance under Title I of the Technology-Related Assistance for Individuals with Disabilities Act of 1988. It examines underlying philosophical, structural, and legal issues involved in the formation and effective use of a foundation or other nonprofit organizational framework to facilitate the provision of assistive technology devices and services. The paper begins by defining a foundation and explaining governmental restrictions on its financing. It then outlines what a foundation can do, focusing on its flexibility in responding to needs, its aim to augment rather than replace public sector resources, deciding whether to charge fees to recipients of the foundation's support, speed of operation, and ability to broaden assistive technology's constituency. Procedures for setting up the organization are discussed, covering such items as governing board makeup and necessary documentation. Tasks involved in maintaining the foundation on an ongoing basis are also spelled out. (12 references) (JDD)

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RESNA
TECHNICAL ASSISTANCE
PROJECT

ESTABLISHING NONPROFIT FOUNDATIONS TO PAY FOR ASSISTIVE TECHNOLOGY

SEPTEMBER 1990

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This paper was developed by John C. De Witt and Steven Mendelsohn of De Witt, Mendelsohn and Associates.

SEPTEMBER 1990

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ESTABLISHING A NONPROFIT FOUNDATION TO PAY FOR ASSISTIVE TECHNOLOGY

INTRODUCTION

Assistive technology devices and services represent an increasingly important source of opportunity for persons with disabilities in such spheres as employment, education and independent living. Accordingly, recent Federal legislation, including most notably the Technology-Related Assistance for Individuals with Disabilities Act of 1988 (Tech Act) has enhanced the flow of Federal funds to the assistive technology field.[1] [2] It is too early to assess the effect upon the provision of assistive technology which will result from the Americans With Disabilities Act of 1990.[3]

This legislation, along with amendments to other categorical and state grant programs, has raised the profile and increased the level of support for assistive technology. It is likely that the need and demand for funding in this area will continue to outstrip available public sector resources for the foreseeable future.

Faced with the disparity between exponential growth in recognition of the need for assistive technology, on the one hand, and the relative inelasticity of governmental resources, on the other, many service-providers and policy makers have begun to explore the potential for utilizing tax exempt nongovernmental organizations for attracting additional financial resources into the field.

Certainly, governmental sources have not been exhausted or even fully explored. What this does suggest, is that every avenue should be explored in order to meet the increasing consumer demand for assistive technology.

States operating with grants under Title I of the "Tech Act" have authority to engage in "partnerships and cooperative initiatives."[4] "Program Authority" is given to engage in:

> "...support of the establishment or continuation of partnerships or cooperative initiatives between the public sector and the private sector to facilitate development and implementation of a state-wide program of technology-related assistance to individuals with disabilities."

Several state programs currently funded under Title I of the Tech Act have expressed an interest in establishing a "foundation." Therefore, RESNA's Technical Assistance Project commissioned De Witt, Mendelsohn & Associates to develop this policy paper.

About the paper The topic of how to establish a "foundation" is worth extensive treatment. However, our particular focus will be upon questions surrounding the incorporation of nongovernmental funding streams into state-wide programs of technology-related assistance under Title I of the Tech Act. Specifically, we will examine underlying philosophical, structural and legal issues involved in the formation and effective use of a foundation or other nonprofit organizational framework to facilitate the provision of assistive technology devices and services.

Except for some discussion of "charitable" purposes, organizational structure and directly applicable Federal tax provisions, we have not attempted to provide "how to" guidelines. They are best left to individualized treatment once a state's Title I organization has made some basic decisions. Considerations of "seed" funding, staffing, the foundation's operation, recipient criteria, fund raising techniques, etc., is the possible subject for another paper.

WHAT IS A FOUNDATION?

Tax exempt Foundations are attractive largely on account of their exemption from Federal income taxes. As a result they are, in most cases, also exempt from state income taxes. Properly organized and administered, a foundation serves two closely related purposes:

- It is itself exempt from income taxes on the funds it receives and uses.
- More importantly, it provides, through the charitable contribution tax deduction, a means by which individuals and businesses interested in a particular area of public policy can reduce the net cost of taxes to themselves by their contributions.

Federal exemption The Internal Revenue Code accords tax exempt status to various kinds of organizations.[5] Most of these are not authorized to raise and solicit funds from the public. However, it is specifically the organizations listed in the famous 501(c)(3) paragraph which can offer tax deductibility to the individuals or businesses that choose to support them. The organizations eligible for 501(c)(3) status are:

> "(3) ...corporations and any community chest, fund or foundation organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes."

Other code provisions Thus, an entity which possesses the dual tax advantages noted above can take any one of a number of organizational forms, and can engage in activities serving a broad range of purposes. When considering the questions of whether a particular

organization is structured in accordance with one or other of the permissible forms, and whether it is operating in a manner consistent with its exempt purposes, numerous other provisions of the tax code must also be consulted.[6] Regardless of the organizational form, state law also plays an essential role.

"Foundation" - no specific meaning Whether as donors, service-providers or fund recipients, most people have had some exposure to the nonprofit sector. "Foundation" is the term we most often use to describe organizations of this kind. It may, therefore, come as a surprise to many that the term "foundation" has no specific or technical meaning under the Internal Revenue Code.

"Foundation," within philanthropic circles, is generally understood to mean an organization which distributes funds. Additionally, it may provide goods or services of some nature to other tax exempt organizations or to people who fall within its purview.

This understanding of what a foundation is probably characterizes public perception as well. Additionally, the term also connotes organizations which raise money from the community through appeals for "public support."

"Private" foundation Because the attraction of the foundation format is its potential for bringing private funds into the assistive technology field, it is important to note a point of nomenclature that can, if not clarified, give rise to considerable confusion. The concept of the "private foundation" does have a specific definition in the tax law.[7] These foundations are subject to a number of restrictions and to a number of penalty taxes that do not apply to other tax exempt organizations. Their administration is far more difficult and complex. Private foundations generally do not raise funds from the community, but instead rely on endowments and proceeds from investments for their operating funds.

It is extremely unlikely that any state Tech Act program wishing to establish a tax exempt vehicle would wish to opt for the "private foundation" format. Yet, raising "private funds" represents the distinct object of the enterprise.

Defining terms The words "public" and "private" are used differently depending upon context. "Public sector" implies a governmental entity; "private sector" implies a nongovernmental entity. A foundation, other than one legally defined by IRS as "private" (see above), raises a significant portion of its revenues from what IRS refers to as "public support." In this context, "public" implies support generated from private individuals and organizations. The latter will usually be corporations, other businesses, nonprofit groups or, on occasion, governmental entities awarding grants or contracts.

"Community" foundation The concept of the "community foundation" represents another organizational variant that has received a great deal of attention. Again, while lacking a precise definition, the term generally refers to those foundations which pool resources from a number of donors or from several smaller trusts to address the needs of a given community. These may or may not utilize programmatic priorities in allocating their

funds. Most often, they endeavor to respond broadly to the evolving needs of the city, region or state which they have been established to serve.

A foundation concerned solely with the assistive technology needs of the disabled community within a particular locale would probably have a narrower focus than the typical community foundation. It is true that the concerns of persons with disabilities are increasingly understood to be coterminous with those of society as a whole. However, use of "community foundation" terminology in this context would probably require that perceptions concerning the nature of a community foundation be modified to some degree.

Corporations and trusts under state law As indicated above, the choice of what organizational form to adopt is, in the end, dependent as much upon state as upon Federal law. While the variation among state laws is far too great to allow for detailed analysis here, it appears to be the case that "trusts" and "corporations" represent the two most widely applicable legal forms of foundations. The trust is frequently used by wealthy individuals or organizations wishing to use their own resources for philanthropic purposes. They do not, as a rule, solicit funds from the public.

Public perception appears to be that a trust has substantial financial reserves. Partly, this may be due to the word appearing in the name of many large financial institutions. Purely from a public relations perspective, the trust structure might be one to avoid when establishing a nonprofit organization wishing to obtain financial support from the public.

"Nonprofit" or "not-for-profit" Between trusts and corporations, the corporate form, as suggested by the familiarity of the term "nonprofit" or "not-for-profit" corporation, is the model which today enjoys an undisputed ascendancy, particularly where broad-based public participation in the organization's support is contemplated. Though potentially impermissible under the law of some states, it should usually be possible to use the term "foundation" in the organization's title, should that be thought desirable.[8]

Other nomenclature Several other issues of nomenclature can also cause unnecessary confusion. Such terms as "public charity," and "charitable foundation" are used loosely in common parlance. No great legal significance, at least so far as tax law is concerned, attaches to the choices between these or among several other similar phrases.

WHAT CAN A FOUNDATION DO?

Flexibility Under the Tech Act, states are accorded a significant degree of flexibility in identifying the needs and defining their responses to these needs. This flexibility is reflected in the variety of priorities and approaches embodied in the plans of the states that have thus far received grants under the new law.

Most activities contemplated under the Tech Act require appropriate financing for effective implementation. Categories such as provision of assistive technology devices and services,

community outreach, and information dissemination could benefit from an alternative funding source such as a foundation. This is consistent with contemporary public-sector philosophy which recognizes the valuable role played by public-private partnerships in program development.

Nevertheless, the kind of partnership that a given organization or consortium may wish to establish, and the precise sort of entity they will choose to create, must depend, more than anything else, on exactly what it is they intend to accomplish.

Setting up and operating a foundation is not unduly complicated or difficult. Designing one that best meets the needs and most fully serves the purposes for which it is created represents a far more challenging problem.

Funds should augment, not replace Whatever else may be intended, the first goal of an assistive technology foundation is to raise money. Yet, even this truism harbors potential dangers. If the foundation is not carefully structured, there is real risk that the funds it raises will be used to replace rather than augment public sector resources.

Though mandated under the Education of the Handicapped Act, Rehabilitation Act and other legislation, assistive technology remains all too discretionary on the part of many state educators, vocational rehabilitation agencies and others. Absent its routine institutionalization within such programs, assistive technology can too easily be remitted to the resources of the nonprofit sector.

For this reason, the foundation's design must ensure that private funds are additive to the system. It must likewise ensure that, so far as matching fund requirements, interagency cooperation and similar issues are concerned, public and private funds are deployed so as to leverage one another to the maximum possible degree.

What this means in practice is deciding clearly who the foundation will serve and what services will be provided. For example:

- if individuals are to be served directly, it may be desirable to craft eligibility criteria ensuring that these will be persons who could not have been, or would not have been, served by existing agencies; or

- determinations of what direct services or devices are to be provided must be made with full knowledge of what is currently available and could enhance the value of existing resources.

Tradeoffs to consider The foundation must frame its fund raising appeals differently depending upon its service objectives. The basic issue to be resolved is whether the recipient of a foundation for assistive technology services and/or devices will themselves pay for any portion of those services or devices. For example, if devices, would they be:

- provided on permanent loan with title retained by the foundation;
- donated outright to the individual with a disability;
- partially donated and partially purchased by the individual;
- funded by a loan to the individual with the loan guaranteed by the foundation; or
- some other mechanism?

Some members of the general public may not be as willing to contribute to an organization which in any way charges for its service to recipients. In this context, they might be willing to support a program which donates devices, but not one which loans funds with the expectation of repayment by the recipient.

Varieties of technology-related assistance which could fall into these categories are:

- device loan financing mechanisms;
- direct device provision;
- assessment;
- evaluation;
- training;
- information dissemination;
- training to assistive technology professionals; or
- on-going maintenance of devices.

Less red tape An advantage that a foundation generally offers is that of speed and flexibility. Beyond resource limitations, public bodies are frequently constrained in the services they can provide by the terms of the categorical service programs under which they operate. Often too, they face limitations and delays in the selection and purchase of assistive devices, due to the procurement procedures, bidding requirements and contracting regulations of their state governments.

Generally, foundations do not operate under comparable strictures. Nevertheless, there are significant decisions which need to be made about how and when it wants to be cast in the role of meeting emergency or urgent needs, as opposed to carrying on a program that aims at longer term goals. The foundation must decide to what extent it wishes to be proactive or is prepared to be reactive.

Broadening assistive technology's constituency Another advantage of a foundation is its ability to broaden assistive technology's constituency in the community. This may be done in at least three ways:

- by increasing the number of people who can benefit from assistive technology;
- by increasing public awareness of the need through its community outreach and fund raising efforts; and
- by providing opportunities for those who have been exposed to assistive technology's potential, to make tax deductible contributions to the cause.

A major caution! The foundation may be confronted with donors, including family members, friends, or even employers, who wish to contribute funds which would then be used for the benefit of a particular individual with a disability. Sometimes the foundation may have to choose between the forfeiture of potential support and the jeopardizing of its credibility, if not in fact of its tax exempt status should it engage in other than what are called "arms-length" transactions.

The motives of those who proffer contributions on condition or expectation that designated individuals be served may be innocent and understandable. However, the foundation would be ill-advised to accept such contributions. No suggestion of a "quid pro quo" should be allowed to creep into decisions regarding recipients of foundation awards or grants.

Expressions of gratitude on the part of those who appreciate what assistive technology has done for their relatives, friends or co-workers are, of course, another matter. Foundations frequently receive donations and bequests as a result of such service.

SETTING UP THE ORGANIZATION

As set forth in the previous section, the first step is deciding, as far as possible, what the organization is to do, and on what scale it is to operate. This is important for the documents that must be filed, such as the Articles of Incorporation at the state level or the request for tax exempt status at the federal level. By the time it comes to filing these documents, no uncertainty should exist as to how they ought to read.

Who's in charge If the state's Title I lead agency is to take the leadership role in establishing the foundation, an initial question must be answered:

- Is the lead agency itself a nongovernmental entity, perhaps organized as a nonprofit corporation? If so, the structure for obtaining funds from the general public may already be in place.

- Is the lead agency a governmental entity? If so, consider issuing a contract for services to establish a nongovernmental nonprofit tax exempt organization to become the foundation.

Seed money Some seed money will be required to meet pre-organizational costs, employ initial staff and establish the ensuing foundation's base of operation as it prepares to raise funds, develop programs and serve individuals with disabilities. Tnese funds might come directly from the Title I grant, through other grants, such as the National Institute on Disability and Rehabilitation Research's innovation, demonstration or model projects or, possibly, from another foundation or private-sector entity.

Whatever the method, the individuals responsible for taking the foundation from dream to reality must act on several fronts. Some activities will occur simultaneously; others, of necessity, will occur sequentially.

Selecting the organizational form The next step is selection of an organizational form that will work best under the law of the particular state. A lawyer is not required to make this choice or to do the paperwork. Optimally, the process will be enhanced by using legal counsel skilled in this area, unless the people creating the organization possess meaningful experience of their own.

Factors A number of factors will influence the choice of organizational form under the state's law such as the:

- relative powers of corporations, trusts, associations, etc.;
- duties of officers and directors under various forms;
- filing requirements and filing fees applicable to each form;
- nature of state oversight once the organization has been established;
- extent to which one or another form will facilitate or inhibit development of its goals and objectives.

Corporate form As noted earlier, the corporate form, specifically the nonprofit corporation, is likely to be the choice in the majority of cases. It usually offers all the tax advantages that could be forthcoming with any other form, as well as these major ones:

- flexibility to modify the program without court approval;
- insulation of directors and officers from personal liability; and
- reasonable scope for delegation of responsibility to staff.

Paperwork The second step involves the completion and filing of the documentation necessary for the establishment and official recognition of the forthcoming foundation.[9] Once again, the documents in question will vary from state to state. Filing for a Certificate of Incorporation is usually the starting point. As part of the process, these steps will probably follow:

- preparing articles of incorporation (the constitution of the foundation as it were);
- developing by-laws (its statutes);
- holding an organizational meeting which will produce a set of minutes, in which adoption of articles and by-laws, naming of officers, creation of a governing board and passage of necessary resolutions will be summarized; and
- preparing a charitable registration if required by other state agencies such as the Secretary of State or Attorney General indicating intention to raise funds from the general public.

Articles of Incorporation The Articles of Incorporation will set forth the purposes of the organization. This should be done with reasonable specificity, but not as to deprive the foundation opportunities to fine-tune its programs as experience and changing conditions dictate. If required or permitted under state law, projected sources of income should also be indicated. If done, cite all expected sources of income such as contributions from the

public, fees for service, sale or lease of devices, or a combination of these sources. This becomes important at the federal level, as discussed later.

Governing board makeup is critical Beyond legal requirements, board makeup is one of the most profound philosophical decisions a foundation makes. In the case of assistive technology, key elements include the:

- level of consumer representation on the board including family members;
- active role of community leaders, especially in fund-raising;
- participation of governmental units in program management;
- involvement of existing service providers including assistive technology specialists
- geographical distribution of board membership in the event the organization will have a state-wide focus;
- clearly defined duties of members, especially in fund-raising and fiscal management; and
- means by which board vacancies will be filled, and related matters.

In order to further "consumer-responsive" program development, it is essential that a substantial number of governing board members be consumers or their family members. Such representation will help the board to be both consumer-responsive and consumer-directed.

Equally vital for a foundation is the inclusion of community leaders, especially from the for-profit business sector. Fund-raising, public relations and community outreach leadership will flow from these individuals.

Asset distribution Either the articles or by-laws will probably also need to address asset distribution in the event of dissolution of the corporation. Subject to assuring that the assets would not fall into private hands or "inure" to the benefit of private parties, this determination should ordinarily be within the discretion of the foundation to make, just as is the ownership of property that it buys.

Until such time as the appropriate state agency or agencies give formal approval for creation of the foundation, no entity capable of receiving a grant of tax exemption yet exists. One could file a request for tax exempt status while still awaiting final state approval, but, where time permits, it makes more sense to address these two levels sequentially.

Application for Federal tax exempt status Request for Federal tax exemption is made on IRS Form 1023 "Application for Recognition of Exemption under Section 501(c)(3)." Pursuant to IRS Form 8718, which in most cases must be submitted with Form 1023, a filing fee of $150 to $300 may be required. As with the state filings, the need for legal counsel depends upon the sophistication of those preparing the exemption request.

Unrelated business taxable income Two issues, which may or may not already have come up at an earlier point, do warrant special attention at this stage. The first of these relates to "unrelated business taxable income."[10] So far as possible, information about organizational purposes and projected sources of income should be prepared in such a fashion as to minimize potential exposure to this tax. If the foundation intends to derive any revenues from the fees for its services or from the sale, lease or other distribution of assistive technology devices, it is vital that these intentions be integrated into its IRS filing in such a way as to preclude, to the maximum degree possible, any erroneous characterization of these subsequent revenues as unrelated business income.

Little known code provision The second issue relates to a little-known provision of the Internal Revenue Code which can have substantial implications for benefiting assistive technology programs.[11] Generally, donations of inventory equipment by businesses to charitable organizations yield a tax deduction for the donor equal to the equipment's production cost, not its wholesale or retail value. Section 170 (e) (3) allows certain corporations to take a larger deduction when they contribute such equipment to exempt organizations for "care of the ill, the needy or infants."

This unfortunate nomenclature notwithstanding, the bottom line of this extremely intricate provision is that for eligible and qualifying donations, the value of the deduction comes closer to what the inventory equipment could have been sold for by its manufacturer. Where available, this enriched deduction can heighten the attractiveness of contributing to a foundation.

If the foundation intends to accept donations of equipment, the opportunity to offer potential donors this sweetened deduction should be borne in mind in the preparation of its organizational documents.

Caution On the other hand, this provision carries with it a number of strict limitations. The recipient foundation is limited in its ability to dispose of the property, or to sell or otherwise charge individuals for it. IRS approval of the exemption request will be evidenced by a determination letter from the appropriate district office. It is not unusual for them to seek additional information in the course of reviewing the request.

MAINTAINING THE FOUNDATION

Once the foundation has been established and received tax exempt status, there are still tasks for the board and officers on an ongoing basis to preserve it. In addition to whatever periodic state filings may be demanded, tax exempt organizations are generally obliged to file an annual information return Form 990 with the IRS. If there is unrelated business income, additional forms may be needed.

Support test The foundation must always be concerned with the maintenance of its tax exempt status. Among other things, it must meet a two-part support test. In essence, this test involves the ability of the foundation to:

- obtain at least one-third of its support from the public revenue sources specified in its filing, and
- avoid deriving more than one-third from investments or other other non-public sources.[12]

The foundation should raise adequate funds from the community and have no need to divert its resources from its exempt purposes into accumulation of endowment or other reserves. As convoluted and intimidating as these provisions may appear, they are unlikely to pose problems for an assistive technology foundation that can boast any measure of community support. Even should a foundation fail under the one-third test in a particular year, there are several fall-back criteria that would operate to protect its tax exempt status.

Because of the dynamic and rapidly changing nature of the assistive technology field, it is difficult to anticipate all the permutations of potential private funding program models. For this reason, no amount of advance planning will guarantee avoidance of situations with unclear tax implications for the foundation. In such situations seeking a Private Letter Ruling from the IRS may be available if IRS deems it an appropriate question of law to be raised. Such a ruling, obtained prospectively, can often provide authoritative guidance necessary for making the most informed decisions. This may be done without great difficulty and at moderate expense.

CONCLUSION

As indicated in the **"INTRODUCTION"**, operational issues such as staffing, fund raising or public relations are outside the scope of a short policy paper. Nevertheless, they are vital to the foundation's success and must be addressed at the appropriate time. In summary, let us restate some of the major issues discussed in this paper.

What the organization is to do, and on what scale it is to operate is key to establishing a foundation. For this, and many other issues, an imaginative and active governing board is essential. Involvement from a broad spectrum of the community is vital, including consumers, community leaders, especially the for profit sector; and, appropriate service providers.

Each of the issues delineated in this paper, as well as many others that could be named, have correlations in organizational form and structure. How funds are raised, how

resources are allocated and what priorities are set represent the central issues in the articulation of a mission and in the organization's day-to-day work.

States operating under Title I grants wishing to raise additional funding for technology-related assistance might:

- cite Section 211 (b) (8) of the Tech Act for "support of the establishment or continuation of partnerships or cooperative initiatives between the public sector and the private sector to facilitate development and implementation of a state-wide program of technology-related assistance to individuals with disabilities."
- organize as a nonprofit corporation under state law;
- use the term "foundation" in the corporate name if deemed appropriate;
- file for tax exemption under Internal Revenue Code Section 501(c)(3) and other applicable provisions;
- file for tax exemption under applicable state law(s); and
- derive at least one-third of its revenues from public support (private individuals and organizations or, in some cases, government).

Whether the specific choices are these, or others, the range of philosophical, structural and legal issues to be considered pose a unique challenge for the establishment of a foundation to pay for the funding of assistive technology for people with disabilities. It is an endeavor peculiar to this decade and America's increasing awareness of the role of people with disabilities in society, strongly supported, we suggest, by the expanded provision of assistive technology.

REFERENCES

1. Technology-Related Assistance for Individuals with Disabilities Act of 1988 (Public Law 100-407), codified at 29 U.S.C. Section 2201 et seq.

2. Except where clarity will be improved, the term "assistive technology" is used throughout this paper. It is inclusive of "technology-related assistance," "assistive technology services and devices", or in the context of technology, "individuals with disabilities" or "consumers and family members".

3. *The American with Disabilities Act (Public Law 101-336).*

4. 29 U.S.C. Section 2211(b)(8).

5. Internal Revenue Code, Section 501.

6. See especially Internal Revenue Code, Section 170(e)(3), Section 509 and Section 512.

7. Internal Revenue Code, Section 509.

8. Except where clarity dictates, the term "foundation" is used throughout the remaining pages. It connotes a non-governmental tax exempt organization authorized to raise funds from the general public.

9. The word "foundation" is assumed to be part of the nonprofit corporation's name, e.g., The XYZ Foundation.

10. Internal Revenue Code, Section 512.

11. Internal Revenue Code, Section 170(e)(3).

12. Internal Revenue Code, Section 509(a).

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